STATE OF MAINE

SUPREME JUDICIAL COURT

SITTING AS THE LAW COURT

Law Docket No.: KEN-16-141

Ismail Mohamed Awad
APPELLANT/DEFENDANT

V.

STATE OF MAINE
APPELLEE

ON APPEAL FROM THE

KENNEBEC COUNTY SUPERIOR COURT

BRIEF OF APPELLANT ISMAIL MOHAMED AWAD

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Procedural history and statement of facts prior to Sell hearing

The Appellant, Ismail Mohamed Awad is appealing from an order entered by the trial court granting the State's Motion for Court Authorized Treatment allowing him to be medicated by force for the sole purpose of restoring his competency so that he can be prosecuted for a variety of offenses. At the time of the hearing on the State's motion there were five separate cases pending against Mr. Awad. Four of those cases originated as charges in Cumberland County and were then transferred to Kennebec County and consolidated for the hearing on the State's motion. Although these matters were consolidated for the hearing and on appeal, a brief procedural history of each case prior to consolidation is included below.

Mr. Awad is charged under KENCD-CR-2016-0795 (formerly docket number CUMCD-CR-13-5321) with one count of Aggravated Trafficking in Scheduled Drugs (class A) and one count of Trafficking in Scheduled Drugs (class B). (A. at 38.) This is the oldest charge pending against Mr. Awad, with an alleged date of offense of March 15, 2013. (A. at 38.) Mr. Awad made his initial appearance on the complaint August 5,

2013. (A. at 20.) No plea was entered. (A. at 20.) The State filed an indictment on October 11, 2013. (A. at 21.)

The Defense filed a Motion for Mental Exam on October 24, 2013. (A. at 22.) A competency report was filed with the court on December 18, 2013. (A. at 22.) As a result of that exam, on or about February 6, 2014 Mr. Awad was admitted to Riverview Psychiatric Center[1] ("Riverview") for observation and treatment. (A. at 23.) He was discharged on or about March 10, 2014, and a competency report was filed with the Court. (A. at 23.) An arraignment was held on March 14, 2014, and Mr. Awad entered a plea of not guilty. (A. at 24.)

Mr. Awad is charged under KENCD-CR-2016-0792 (formerly CUMCD-CR-14-818) with one count of Burglary (class B), and one count of Theft by Unauthorized Taking (class C). (A. at 35.) The alleged date of offense is August 2, 2013. (A. at 35). He was arraigned on March 14, 2014, and entered a plea of not guilty. (A. at 1.)

Mr. Awad is charged under KENCD-CR-16-0794 (formerly docket number CUMCD-CR-14-819) with one count of Theft by Unauthorized Taking (class C). (A. at 37.) The alleged date of offense is August 4, 2013.

[1] Riverview is operated by the Department of Health and Human Services.

(A. at 37.) The indictment was filed on February 7, 2014. (A. at 37.) Mr. Awad entered a not guilty plea on March 14, 2014. (A. at 14.)

Mr. Awad is charged under KENCD-CR-2016-0793 (formerly docket number CUMCD-CR-14-6142) with one count of Theft by Unauthorized Taking or Transfer (class E). (A. at 36) The date of the alleged offense is July 30, 2013. (A. at 36). The Defendant was arraigned on the complaint March 14, 2014 and entered a not-guilty plea. (A. at 8).

Following Mr. Awad's arraignment on each of the four Cumberland County cases on March 14, 2014, the Defense filed a second Motion for Mental Examination under each of the Cumberland County cases on May 2, 2014, which was granted by the trial court on May 14, 2014. (A. at 2, 9, 15, 24.) From that point forward the Cumberland cases followed the same procedural course.

Mr. Awad was admitted to Riverview for observation and treatment on May 29, 2014. (A. at 2, 15, 24.) He was discharged on June 17, 2014, at the conclusion of his observation period. (A. at 3, 9, 16, 24). A competency report was filed on July 18, 2014. (A. at 3, 9, 16, 25). Following a competency hearing, the Court found that Mr. Awad was not competent to stand trial in these matters and ordered him committed to

the custody of the Department of Health and Human Services for restoration on September 9, 2014. (A. at 4, 10, 17, 25) He was again admitted to Riverview Psychiatric Center on or about September 16, 2014. (A. at 4, 10, 17, 26.)

On or about October 14, 2014, while he was committed to Riverview following the Court's determination that he was not competent to be prosecuted on the Cumberland County cases, Mr. Awad was charged with Aggravated Assault for allegedly assaulting a Riverview staff member. (A. at 40.) The Court set bail in the amount of $3,000, with the condition that Mr. Awad "Not to go to Riverview Psychiatric Center." (A. at 29.) A competency exam was also ordered, which took place at the Kennebec County Jail. (A. at 30.) Apparently, despite the fact that a court order stated that he was to be committed to the custody of the Department of Health and Human Services, Mr. Awad was held in the Kennebec County Jail on this new charge. The Court also entered an order for Mr. Awad to be evaluated to determine if he was competent. (A. at 30.)

Dr. Donnelly, a forensic psychologist contracted by the State Forensic Service to administer the evaluation, met with Mr. Awad on November 12, 2014. (A. at 103.) Mr. Awad was shackled and a

corrections officer was present armed with a Taser. (A. at 103.) Dr. Donnelly noted that it was "unclear whether he understood the context of the evaluation ... He was not orientated to the day of the week or the month. He displayed unusual behaviors. At times he would put his hands together, point to the sky and stare off." (A. at 104).

In his competency evaluation dated November 18, 2014, Dr. Peter Donnelly reported that Mr. Awad had an extensive history of psychiatric hospitalizations including multiple hospitalizations at the Bridgewater State Hospital in Massachusetts, three hospitalizations at Spring Harbor, and "at least one" hospitalization at Maine Medical Center. (A. 104.) At the time of the alleged assault Mr. Awad was in his fourth hospitalization at Riverview. (A. at 104.) Dr. Donnelly noted that in his discharge summary from a prior Riverview Hospitalization, Miriam Davidson, a psychiatric nurse practitioner noted that "[d]espite attempts to redirect behavior, Mr. Awad spits on the ground, tables, and on other clients and staff. He urinates in his room and on the floor and the milieu. It has been difficult to determine an exact diagnosis regarding Mr. Awad and his presenting symptoms." (A. at 104.)

On January 13, 2015, the Kennebec County trial court found Mr. Awad incompetent to stand trial on the new charge of Aggravated Assault. (A. at 30.) Mr. Awad was readmitted to Riverview for restoration on or about February 5, 2015. (A. at 31.)

Over the next year Mr. Awad was evaluated five times in regard to his competency. (A. at 88-103.) Each time it was opined that he was not competent to stand trial. During this time Mr. Awad's compliance with medication was intermittent, likely due to reported side effects. (A. at 91; Tr. at 33.)

Factual History Relevant to the Hearing on the State's Motion for Court Authorized Treatment

Mr. Awad's competency had not been restored as of November of 2015, despite continued hospitalization. In his evaluation dated November 6, 2015, Dr. Donnelly opined it was unlikely that Mr. Awad's competency could be restored. (A. at 92.)

Following this evaluation, the matter was scheduled for a competency hearing on November 20, 2015, which was continued for reasons that were later disputed. (Tr. 188-190) The State filed a Motion for Court Authorized Treatment on December 24, 2015, seeking authorization to forcibly medicate Mr. Awad to restore his competency

pursuant to 15 M.R.S. § 106 [2] (A. at 32, 49.) The Cumberland County cases were consolidated with the Kennebec County case for the hearing.

On December 31, 2015, Mr. Awad's attorney appointed to represent him in the Kennebec County cases filed an Objection to the State's Motion for Court Authorized Treatment and a Motion to Dismiss. (A. at 53, 72.) Mr. Awad filed an objection to the State's Motion for Court Authorized Treatment and a Motion to Dismiss in regard to the Cumberland County matters on March 6, 2016. (A at 76, 81.)

On March 7, 2016 a testimonial hearing was held on the State's Motion for Court Authorized Treatment, as well as Mr. Awad's Motions to Dismiss. The Motion to Dismiss was argued first and the Court took it under advisement.

Testimony of Dr. Peter Donnelly

The proceeding then turned to the State's Motion seeking to forcibly medicate Mr. Awad. The State's first witness was Dr. Peter Donnelly, who is a forensic and clinical psychologist. (Tr. at 15.) He testified that he has been a licensed psychologist for 25 years and a forensic psychologist since 2005. (Tr. At 15.) Dr. Donnelly testified that he had

[2] The Motion for Court Authorized Treatment apparently was applicable to the five cases pending against the Appellant, although that Motion was not specifically filed in each case. It was only filed under AUGSC-CR-14-1035.

evaluated Mr. Awad a total of seven times. (Tr. At 17.) Dr. Donnelly testified that Mr. Awad was not able to demonstrate an understanding of the consequences of the charges against him, nor the legal concepts of a no contest plea or a plea of not criminally responsible. (Tr. At 19.) He was unable to explain reasons why it was important to have an attorney. (Tr. at 20.) Dr. Donnelly testified that Mr. Awad had been hospitalized at Bridgewater State Hospital, Spring Harbor, and possibly Maine Medical Center in the past. (Tr. at 21.) His previous diagnoses included schizophrenia, polysubstance abuse, and antisocial personality disorder. (Tr. at 22.) Dr. Donnelly testified that his observations of Mr. Awad were consistent with his diagnosis of Schizophrenia. (Tr. at 22.)

Dr. Donnelly also offered testimony in regard to the numerous times that he attempted to evaluate Mr. Awad. Dr. Donnelly described that during his evaluation with Mr. Awad on November 18, 2014, he learned that Mr. Awad had not been eating, was extraordinarily thin, and would go "in and out of being able to respond to any kind of question." (Tr. at 24.)

Dr. Donnelly again attempted to evaluate Mr. Awad in March of 2015, but was unsuccessful due to Mr. Awad's mental state. (Tr. at 26.)

Dr. Donnelly concluded that Mr. Awad did not have the skills associated with competence. (Tr. at 27; A. at 102-103.) Dr. Donnelly did note that Mr. Awad was largely non-compliant with any medical treatment and that if he increased his "compliance with medication, then there is a possibility of restoring Mr. Awad's competency." (Tr. at 28.)

On May 14, 2015, Dr. Donnelly attempted to meet with Mr. Awad for another evaluation, but Mr. Awad refused to meet with him. (Tr. at 29.) It was reported to Dr. Donnelly that Mr. Awad was still demonstrating features that would make him incompetent. (Tr. at 29.)

Dr. Donnelly testified that he met with Mr. Awad on July 14, 2015, his fourth examination. (Tr. at 29.) Progress notes generated by Miriam Davidson, a psychiatric nurse practitioner, indicated that Mr. Awad was prescribed Zyprexa, an anti-psychotic, but that Mr. Awad would often refuse that medication. (Tr. at 30.) During this evaluation Dr. Donnelly noted that Mr. Awad was confused about his case, although he was at least able to discuss his charges to a limited degree. (Tr. at 30.) Mr. Awad also reported that he did not take medications because they made him feel sick. (Tr. at 31.) Dr. Donnelly observed "odd behaviors" such as staring at the ceiling and other behaviors that indicated Mr. Awad was

still in a psychotic state. (Tr. at 32.) Dr. Donnelly opined that "if he was steadily on psychotropics, we might possibly see a different individual, but that he was not currently motivated [to take medications] likely due to not liking the side effects." (Tr. at 33.)

Dr. Donnelly testified that on November 4, 2015, he again attempted to meet with Mr. Awad. The records from Riverview indicated that Mr. Awad had been taking his Zyprexa intermittently. (Tr. at 33.) Dr. Donnelly also noted that he had gained some weight and looked healthier. (Tr. at 34.) Dr. Donnelly testified that he was able to talk for almost an hour, and was "able to tolerate being asked questions and give simple responses." (Tr. at 35.) In his evaluation Dr. Donnelly noted that staff were still observing Mr. Awad to be experiencing hallucinations. (A. at 90.) He also continued to respond to "internal stimuli" by "urinating in cups in his room, talking to himself, laughing to himself, hitting his head on windows, and staring at the ceiling." (A. at 91-92.) Dr. Donnelly's report concluded by stating that "[Mr. Awad] has had a substantial amount of treatment, medication attempts, and efforts to reconstitute his competency. At this juncture, it appears as if it is

unlikely that his abilities to demonstrate competency can be restored." (A. at 92.)

The last evaluation occurred on February 2, 2016. (Tr. at 37.) Dr. Donnelly testified that Mr. Awad was still not medication compliant at the time, and that he was "blatantly psychotic and not presenting with the skills associated with competency." (Tr. at 38.) Dr. Donnelly testified that he had opined that "any hope of restoring competency would depend on medication compliance." (Tr. at 39; A. at 86.)

On direct the State asked Dr. Donnelly if Mr. Awad could display symptoms of his disorder and still be able to achieve competence if he were subject to a "substantial period of medication compliance?" (Tr. at 39.) Dr. Donnelly responded that it was possible, but that there were a number of other "cognitive issues that need to be assessed of whether he's even at an intelligence level that could understand what's happening in court." (Tr. at 39-40.) He indicated that drug use may have significantly impacted his neurological functioning. (Tr. at 40.) Dr. Donnelly stated that if Mr. Awad were compliant with his medication, the next step would be to determine if his other cognitive limitations would be a barrier to restoring his competence. (Tr. at 40.) The State asked Dr. Donnelly point

blank if he had an "opinion as to the likelihood of Mr. Awad being restored if he were to be on a significant medication regime," to which Dr. Donnelly responded, "I don't have an opinion on that. I really—it would just be guessing." (Tr. at 41.)

Dr. Donnelly also explained that there is a difference between a Defendant being competent to plea, versus competent to have a trial. (Tr. at 43.) Dr. Donnelly explained that if a person understood "the dimension of the plea, and what the consequences would be..." that they may be competent to enter a plea. (Tr. at 44.) However, he explained that competency to endure the rigor of a trial, including having to maintain attention for a long period of time and responding to developments, was a much higher bar. (Tr. at 44.) When questioned by the Court, Dr. Donnelly again testified that it was outside his area of expertise to opine on whether medication "would be substantially likely to render [Mr. Awad] competent..." (Tr. at 53.)

Testimony of Miriam Davidson

The State next called Miriam Davidson, who is Mr. Awad's psychiatric nurse practitioner at Riverview. (Tr. at 55.) She testified that she works on the Lower Saco unit of Riverview, which is the unit

that people are assigned to when they have been found not criminally responsible or are at the hospital in relation to forensic issues. (Tr. at 56.) She testified that Mr. Awad had been admitted multiple times to Riverview following findings of incompetence to stand trial in regard to a variety of charges. (Tr. at 62-63.) She testified that in October of 2014, while he was admitted under a court order for the Cumberland cases, he assaulted multiple people, was arrested, and then "sent back to us after he was found incompetent to stand trial with the addition of the assault and the aggravated assault charges from Kennebec County." (Tr. at 63.)

Ms. Davidson also offered testimony about the civil commitment process that occurs if a defendant is not competent and not restorable. (A. at 95.) She indicated that such an individual would be evaluated to determine if they met the criteria for involuntary hospitalization, which would be "based on dangerousness to self or others or inability to care for self." (sic)(Tr. at 96.) She elaborated that the hospital has an "obligation before sending them out of the hospital to ensure there isn't a concern about the safety to self or others or inability to care for self." (sic) (Tr. at 97.)

Ms. Davidson testified about Mr. Awad's history regarding compliance with recommendations for mediations. She indicated that while at Riverview Mr. Awad had intermittently been prescribed Haldol, Ativan, and Zyprexa. (Tr. at 70.) She testified that Mr. Awad was most compliant with his medication from August 2015 to late October of 2015, where he took his prescribed medications 25 times out of a total 120 times it was offered to him. (Tr. at 72.) She also indicated that this was the period where he was functioning "as well as I've seen him function." (Tr. at 77.) She described this improved functioning as being better able to participate in activities of "daily living...," and as an example stated that Mr. Awad would tolerate his hair being cut, using the toilet appropriately, maintaining safety, and going to the cafeteria. (Tr. at 77-78.) However, Ms. Davidson indicated that since mid-November 2015, Mr. Awad had not been "engaged in any of the recommended treatment..." (A. at 93.)

Later in her testimony Ms. Davidson stated that Mr. Awad did experience "therapeutic effects" when he was administered both Haldol and Zyprexa, both antipsychotic medications. (Tr. at 100.) She was then asked by the State if she had an opinion as to whether those medications

would restore Mr. Awad's competency. She stated that she believed the medication would restore his competency, and gave several reasons. First, she indicated that "very small" amounts of medications resulted in "advancements," which presumably was a reference to the improved behaviors that she had described earlier in her testimony. (Tr. at 101.) She also testified that she researched "restoration of competency hearings," which indicated "that for Defendants who have a psychotic illness, that close to 79 percent can restore their competency with antipsychotic medication treatment." (Tr. at 101.) She was not able to offer specifics about those studies, such as what "psychotic" illness those persons were diagnosed with, the types of medications that were administered, the dosage of those mediations, the side effects among those groups, or the length of time that it took to restore competency. (Tr. at 102.) The State then asked the leading question, "if Mr. Awad were to be on a consistent treatment regime for three to six months, is there a substantial likelihood that he would be restored to competency?" (Tr. at 102.) Ms. Davidson answered "Yes." (Tr. at 102.)

Mr. Awad objected to the question as leading, and challenged her qualification to answer the question because it was "assuming Ms.

Davidson's expertise on competency, which she's not." (Tr. at 102.) The Court sustained the objection on the basis that it was leading, but in regard to the foundation for her testimony as to competency the Court stated that "[y]ou can inquire on cross if you don't think she has the requisite expertise to offer that opinion." (Tr. at 103.) Ms. Davidson then testified that the medications would address those symptoms that "they're seeing that's not allowing him to become competent. From my assessment on reading Dr. Donnelly's reports and his concerns surrounding competency, I do believe that it's substantially likely that the medication would restore Mr. Awad to competency based on what State Forensic Services has identified as their concerns." (Tr. at 103.) Later in her testimony Ms. Davidson clarified that when she testified medication was substantially likely to restore his competency, she meant that it was more likely than not the medication would have the effect of restoring his competency. (Tr. at 106.)

On cross Ms. Davidson admitted that she is "not qualified to offer a forensic opinion in regard to competency of Mr. Awad or any other patient." (Tr. at 104.) She then stated that she could draw a conclusion that these symptoms are "substantially likely to be *addressed* or *changed*

or treated by the symptoms—by the medication, by the antipsychotic medication." (Tr. at 105.) (emphasis added). She was also asked if Mr. Awad's ability to assist counsel was "seriously compromised." (Tr. at 107.) Ms. Davidson responded that he had difficulty in that regard, but "that's another concept that maybe I'm not as familiar with as I should be in my assessment, just by the way he's able to interact with, not just counsel but anybody." (Tr. at 107.) Ms. Davidson also testified that Mr. Awad's level of functioning was "markedly below" what would be expected from someone who spent an extended period of time at the psychiatric hospital. (Tr. at 105.)

Ms. Davidson testified that Mr. Awad had reported that Zyprexa had caused him sedation, and that a higher dose would be likely to increase his sedation. (Tr. at 108-09.) She acknowledged that sedation could affect Mr. Awad's ability to assist counsel in his defense. (Tr. at 85.) She also testified that side effects of Zyprexa could include seizures and dystonic reactions (impact on muscle movements). (Tr. at 108-110)

In regard to the trial of medication that she would recommend, Ms. Davidson testified that a medication trial of between three to six months would be necessary to determine the maximum impact it may have on a

person. (Tr. at 82.) She later testified that if the first trial was unsuccessful, a trial on another medication for three to six months would be recommended. (Tr. at 115.) If that did not work, then they would ideally administer multiple medications for three to six months. (Tr. at 115.)

She also testified that a number of non-medication interventions had been tried with Mr. Awad, such as treatment in small groups, education compliance, etc. (Tr. at 92). She testified that forced medication was in Mr. Awad's best interest in light of his condition. (Tr. at 91.) At the conclusion of Ms. Davidson's testimony, the State rested. (Tr. at 126.) Mr. Awad made a Motion for a Directed Verdict (or its equivalent), which was denied. (Tr. at 128-29.)

Testimony of Dr. Carlyle Voss

Mr. Awad then called Dr. Voss as a witness. (Tr. at 130.) Dr. Voss testified that he is a licensed physician, and is board certified in psychiatry and forensic psychiatry. (Tr. at 130.) His credentials included running the outpatient department at Maine Medical Center for 17 years, then the inpatient department for ten years "treating people with severe chronic illnesses." (Tr. at 130.) He teaches forensic psychiatry at

Maine Medical Center, and also consults on forensic issues. (Tr. at 130.) Dr. Voss testified about his interaction with Mr. Awad during an evaluation where Mr. Awad was responding to internal stimuli. (Tr. at 132.)

In regard to the time period where Ms. Davidson had testified Mr. Awad made some improvements while on sub-therapeutic dosages of anti-psychotics, Dr. Voss noted that the records indicated Mr. Awad was still "urinating in his room" and "hallucinating actively." (Tr. at 133.) He disputed Ms. Davidson's characterization that Mr. Awad showed a "marked improvement." (Tr. at 134.) Dr. Voss agreed with Ms. Davidson that medication was likely to improve Mr. Awad's functioning in general. (Tr. at 134.) However, he distinguished general improvement from competency, stating that:

> "I think it's likely there that he does better if he takes medication. How far that's going to go in terms of improvement is not known. He has a severe illness and the chances of his improving to a level that will allow—where you and me see standards for competency to proceed is quite guarded to poor, I think."

(Tr. at 134.) In particular, Dr. Voss was skeptical that Mr. Awad would improve to the point where he could assist his counsel, based on his history of non-cooperation with people who are trying to help him. (Tr.

at 136.) Dr. Voss also explained that his prognosis was based on the fact that Mr. Awad's condition is more serious than most people with schizophrenia, which is further complicated by prior substance abuse and personality "problems." (Tr. at 137.) When questioned by the Court, Dr. Voss agreed that medication restores competency to the majority of patients, but that such a result was not likely in Mr. Awad's case due to the severity of his illness and the minimal degree of improvement that was exhibited while Mr. Awad was medicated. (Tr. at 163-64.)

In regard to side effects of medications, Dr. Voss testified that approximately twenty percent of patients on Zyprexa experience "major adverse effects," including significant weight gain. (Tr. at 140.) He also stated that the act of forcibly medicating Mr. Awad, which was a likely event, "would be psychologically traumatic." (Tr. at 141.)

The last witness for the Defense, Mary Owens, is a nurse who has worked with Mr. Awad at Riverview. (Tr. at 167.) Although Ms. Owens stated she had seen some improvement with Mr. Awad when he took medication, she had never been able to have any type a conversation that involved any dialogue. (Tr. at 169.) Following oral closings, the hearing concluded.

Trial Court's findings and order granting the State's Motion to Involuntarily Medicate Mr. Awad

On March 22, 2016 the trial court issued an order granting the State's Motion to Involuntarily Medicate Mr. Awad and denying Mr. Awad's Motion to Dismiss. (A. at 41.) The Court noted that Dr. Donnelly was not able to offer an opinion as to the likelihood that Mr. Awad's competency could be restored. (A. at 44.) The Court made a factual finding that "although it took some coaxing from the State for Ms. Davidson to so opine, she did testify that involuntary medication was substantially likely to render the Defendant competent to proceed." (A. at 45.)

In regard to Dr. Voss, the Court found that "the doctor's testimony was quite thoughtful and objective." (A. at 45.) The Court noted that Dr. Voss opined it was "possible" that Mr. Awad would "improve," however that the possibility of restoring Mr. Awad's competency was "poor." (A. at 45.) The court ended its summary of Dr. Voss's testimony by quoting a section of Dr. Voss's report that stated "(I)t is unfortunate that Mr. Awad is refusing to take treatment that has the potential to significantly improve his quality of life and allow him to live more independently in the community." (A. at 45.) The Court did not indicate why it credited

Ms. Davidson's testimony over that of the more experienced Dr.s Voss and Dr. Donnelly.

The court then addressed each of the *Sell* factors with varying degrees of specificity. In regard to the first factor, the Court found that the State had an important interest in restoring Mr. Awad's competency, but did not address whether there are special circumstances that might lessen that interest. (A. at 45-46.) In regard to the second factor, which is perhaps the most complex, the court issued only limited findings, stating in whole that:

> "Although the evidence is in conflict, the Court determines that the medication proposed is substantially likely to render the Defendant competent to proceed. The Court finds further that to **not** medicate the Defendant virtually assures that Defendant will **never** have his competency restored, and that the very real possibility exists that Defendant will be confined to a mental institution for the foreseeable future. The Court also finds that there is very little likelihood that any side effects would significantly interfere with the Defendant's ability to assist counsel in Defendant's defense." (A. at 46.) (emphasis in original.)

The Court then provided minimal guidelines for administering those medications, stating that "[A]ntipsychotic medication as deemed appropriate by the Defendant's treating medical team is authorized. Medication may be switched to other medications within the class of medicines testified to by Ms. Davisson to maximize positive results and

minimize deleterious side effects." (A. at 47.) The court did not specify what medications may be administered, nor were limits placed on the maximum dosage. Essentially the Court deferred all decision making to Mr. Awad's providers. Mr. Awad filed a timely notice of appeal of this order. The trial court stayed execution of its order pending this appeal. (A. at 33.)

Statement of issues presented for review

I. Should this Court adopt a *de novo* standard of review when deciding whether the State has met its burden under the first and second Sell factors, where they involve mixed questions of law and fact, and adopt a clear error standard in regard to the remaining factors?

II. Did the State meet its burden to prove by clear and convincing evidence that it has an important interest in prosecuting Mr. Awad in light of the special circumstances of this case?

III. Did the State fail to meet its burden to prove by clear and convincing evidence that forcibly medicating Mr. Awad will significantly further important state interests under the second *Sell* factor?

IV. Did the trial court fail to make the necessary factual findings to support its conclusion that the State met its burden to prove the *Sell* factors by clear and convincing evidence?

a. Did the trial court fail to make factual findings sufficient to withstand appellate review where it did not explain why it credited Ms. Davidson's testimony over that of Dr. Voss and Dr. Donnelly?

b. Whether the trial court's factual findings are insufficient where the order fails to identify the specific medications and maximum dosages that can be administered to Mr. Awad and still comport with the second and forth *Sell* factors?

c. Is the trial court's order inadequate where it failed to consider whether alternate grounds exist to medicate Mr. Awad, which is a prerequisite for determining whether involuntarily medicating a defendant under *Sell* is necessary to further important state interests?

Summary of the argument

This Court is presented with a matter of first impression in this jurisdiction, namely judicial review of an order that grants the State

authority to involuntarily medicate a criminal defendant *solely* for the purpose of restoring their competency so that they can be prosecuted for alleged criminal offense. In *Sell v. United States* 539 U.S. 166 (2003) the Supreme Court articulated four separate factors that must be proven by the State before such an order can be issued by a Court. In addition, in 2015, the legislature enacted 15 M.R.S § 106, which codified the requirements set forth in *Sell.* For purposes of clarity, Mr. Awad will refer to those factors as *Sell* factors.[3]

First, Mr. Awad asserts that the second *Sell* factor should be subject to bifurcated appellate review. Mr. Awad also challenges the trial court's finding in regard to all of the *Sell* factors.[4] The State failed to prove the first *Sell* factor, because the State's important interest in prosecuting Mr. Awad is diminished because Mr. Awad would likely be civilly committed if he is not prosecuted, and he has already served a significant period of time pretrial that will be credited toward his sentence. The State did not prove by clear and convincing evidence that involuntarily medicating Mr.

[3] Given that the language of 15 M.R.S. § 106 tracks the *Sell* decision, Mr. Awad is not expressly challenging the constitutionality of the statute. However, to the extent that any provision in the statute is contrary to *Sell* or its progeny, *Sell*, and not the statute, would be binding on this Court.

[4] In *Sell* the Supreme Court states that the third factor is whether involuntary medication is necessary to render a defendant competent and that there are no less intrusive means to achieve the same result. *Sell*, 539 U.S. at 180, 181. The statute breaks down this third factor into separate elements. 15 M.R.S. § 106 (3)(B) (3),(4). For clarity with decisions from other jurisdictions, Mr. Awad will refer to paragraph's (B)(3) and (4) as the third *Sell* factor.

Awad would further the State's interest, because the testimony indicates that medication is not substantially likely to restore his competence. In addition, the State did not prove that the administration of medications was substantially unlikely to significantly interfere with Mr. Awad's ability to assist in his defense. Additionally, the failure of the trial court to make specific factual findings in regard to the testimony of witnesses and the proposed treatment plan is in conflict with the constitutional limitations imposed by *Sell*. *See United States v. Hernandez-Vasquez*, 513 F.3d 908, 916-17 (2007). Lastly, the State did not meet its burden in regard to the third *Sell* factor, because no alternative grounds to medicate Mr. Awad were ever addressed in the court's order.

Standard of Review

The *Sell* decision did not articulate a standard of appellate review. The vast majority of the federal and state courts, if not all, conduct a *de novo* review of a trial court's finding that restoring a defendant's competence will further an important government interest under the first factor. *United States v. Dillon*, 738 F.3d 284, 291 (D.C. Cir. 2013). There is a division among courts as to whether the second factor should be subject to *de novo* review or the more deferential standard of clear error.

Mr. Awad contends for reasons set forth in section I, that the ultimate conclusion under the second *Sell* factor should be subject to *de novo* review. Factual findings relevant to the court's analysis under the first two *Sell* factors and 15 M.R.S. § 106, as well as the ultimate conclusion by the court under the last two factors, should be reviewed for clear error. *See State v. Barzee*, 2007 UT 95, ¶ 31 (Utah 2007).

The State bears the burden to prove *each* of the *Sell* factors by clear and convincing evidence. 15 M.R.S. § 106 (4) (2015); *United States v. Dillon*, at 291; *State v. Lopez,* 355 Or. 72, 102 (2014); See *also Addington v. Texas*, 441 U.S. 418, 431-33 (1979) (due process requires state to provide criteria for civil commitment by clear and convincing evidence).

Argument

The Due Process Clause of the United States Constitution recognizes that forcibly medicating an individual is a significant deprivation of a person's liberty, and therefore is only permissible under rare and limited circumstances following a hearing where the State proves by clear and convincing evidence each of the factors set forth in *Sell v. United States* and 15 M.R.S. § 106

> "The forcible injection of medication into a nonconsenting person's body... represents a substantial interference with that person's liberty. The interference is particularly severe when, as in this case, the medication in question is an antipsychotic, for the use of such medications threatens an individual's mental, as well as physical integrity. On the physical side, there is the violence inherent in forcible medication, compounded when it comes to

> antipsychotics by the possibility of serious, even fatal, side effects. But it is the invasion into a person's mental state that truly distinguishes antipsychotics, a class of medications expressly intended to alter the will and mind of the subject."

Unties States v. Watson, 793 F.3d 416, 419 (4th Cir. 2015) (internal citations and quotations omitted). Accordingly, where the purpose of forcibly medicating a defendant against their will is solely for the purpose of restoring competency, the State must meet the criteria specifically outlined in *Sell v. United States* to comport with Due Process requirements. 539 U.S. 166.

First, a court must find that there are important governmental interests at stake. *Id.* at 180; 15 M.R.S. § 106 (3)(B)(1) (2015). Although the Supreme Court recognized there is an important governmental interest in enforcing the criminal laws, it also noted that the interest may be lessened under circumstances where a person may be subject to a lengthy confinement if competency is not restored, or when the person has served a significant portion of their sentence. *Id.*

Second, the interests of the State must be significantly furthered by involuntarily medicating a person. This requires a finding by clear and convincing evidence that the involuntary administration of said drugs is "substantially likely to render the defendant competent to stand trial,"

and that "administration of the drugs is substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense, thereby rendering the trial unfair." *Id.* at 180-81 (emphasis added); 15 M.R.S. § 106 (3)(B)(2)(a), (b).

Third, the court must conclude that medicating a defendant *pursuant to the guidelines in Sell* is necessary to further the important state interest. *Id.* 15 M.R.S. §106 (3)(B)(3). "The court must find that any alternative, less intrusive treatments are unlikely to achieve substantially the same results." *Id.* Fourth, the court must find that the involuntary medicating the defendant is "medically appropriate, i.e., in the patient's best interest in light of his medical condition." *Id.* at 181.

The *Sell* factors are not a balancing test, but rather "a set of independent requirements, each of which must be found to be true before the forcible administration of psychotropic drugs may be considered constitutionally permissible." *State v. Lopes*, 355 Or. at 91.

This test outlined in *Sell* was recently codified in 15 M.R.S. § 106. The statute authorizes a court to enter an order allowing a defendant to be forcibly medicated solely for the purpose of restoring competency if the court finds by clear and convincing evidence that:

(1) Important state interests are at stake in restoring the defendant's competency;
(2) Involuntary medication will significantly further important state interests, in that the medication proposed:
(a) Is substantially likely to render the defendant competent to proceed; and
(b) Is substantially unlikely to produce side effects that would significantly interfere with the defendant's ability to assist the defense counsel in conducting the defendant's defense;
(3) Involuntary medication is necessary to further important state interests;
(4) Any alternate less intrusive treatments are unlikely to achieve substantially the same results; and
(5) The administration of the proposed medication is medically appropriate, as it is in the defendant's best medical interest in light of the defendant's medical condition.

This case is one of first impression for this Court, as neither the criteria articulated by *Sell* or §106 has been subject to appellate review by this Court. However, *Sell* has been interpreted by a number of courts in other jurisdictions, which provides guidance for the issues in this appeal.

I. This Court should adopt a *de novo* standard of review when deciding whether the State has met its burden under the first and second *Sell* factors, because they involve mixed questions of law and fact, and adopt a clear error standard in regard to the remaining factors.

Before the substance of the legal arguments can be addressed this Court must determine the standard of review to be applied to each of the

Sell factors.[5] This Court should adopt a *de novo* standard of review in regard to the first two *Sell* factors, and a clear error standard of review in regard to the third and fourth factors.

Other jurisdictions have consistently applied a *de novo* standard of review to the first *Sell* factor (important state interest), and a clear error standard as to the third and fourth factors, namely whether medicating a defendant is necessary to render them competent and whether medication is in their best interest. *United States v. Chaves*, 734 F.3d 1247, 1250 (10th Cir. 2013); *United States v. Dillon*, 738 F. 3d at 291. In regard to the second *Sell* factor, whether involuntarily medicating the Defendant will significantly further those interest, there is not unanimity among the courts. However, applying a *de novo* standard or review to what is a question of mixed law and fact would be most consistent with this Court's precedent on other issues of similar importance.

Mixed questions of law and fact in criminal cases that involve constitutionally significant issues are often subject to a bifurcated

[5] It appears to the Appellant that the statute is consistent with the *Sell* decision. To the extent that that any part of the statute is inconsistent with *Sell,* it would likely be unconstitutional.

review. In those situations, this Court will review the trial court's factual findings for clear error, but:

> [T]he ultimate question of whether the facts, as found, establish [a constitutional violation] is a distinctly legal question that we will review *de novo*. This approach is consistent with the bifurcated standard of review that the Unites States Supreme Court and this Court apply to a variety of analogous issues *with constitutional import*.

State v. Nadeau, 2010 ME 71, ¶ 18, 1 A.3d 445 (bifurcated review of consent to search). *See also State v. Tuplin*, 2006 ME 83, ¶ 13, 901 A.2d 792, 796 (bifurcated review of waiver of right to testify); *State v. Wiley*, 2013 ME 30, ¶ 14, 61 A.3d 750, 754 (bifurcated review of voluntariness of statements); *State v. Watson*, 2006 ME 80, ¶ 31, 900 A.2d 702, 713 (bifurcated review of waiver of right of counsel); *See United States v. Chaves*, 734 F.3d at 1250 (bifurcated review of second *Sell* factor); *United States v. Bradley*, 417 F.3d 1107, 1113-14 (10th Cir. 2005).

The right of a person to be free from the unwanted administration of psychotropic drugs is unquestionably of "constitutional import," as it is recognized to be a significant liberty interest protected by the Due Process Clause of the United States Constitution. *Sell*, 539 U.S. 166. Whether medication will "significantly further" an important state interest is property characterized as legal question, informed by factual

findings as to the likelihood that medication will render a defendant competent or interfere with their ability to assist in their defense.

A bifurcated review of the second factor is most appropriate, because it allows this Court the flexibility to make an independent determination based on the entire record, subject to deference to the trial court on factual issues. Given the significant deprivation of a defendant's liberty interest at stake here in what should be a "rare" occurrence, proper and responsible judicial oversight mandates a less deferential standard of review. As such, the second factor here should be subject to a bifurcated standard of review, rather than clear error.

II. The State did not meet its burden to prove by clear and convincing evidence that it has an important interest in prosecuting Mr. Awad in light of the special circumstances of this case

The first prong of the *Sell* test requires the court to find that there are important governmental interests at stake. *Sell* 539 U.S. at 180. The government has an important interest in "bringing to trial an individual accused of a serious crime." *United States v. Dillon*, 738 F.3d at 290. Accordingly, the court must determine if the charged offense is a "serious" crime.[6] *Id.* at 292. The courts also look at many factors that

[6] Courts have applied two different tests to determine whether a crime is serious. Some courts base that determination on the maximum period of incarceration that may be imposed, while others examine the defendant's

are commonly accepted principles associated with the criminal justice system when determining the nature of the state's interest, such as deterrence and supervision.

Even when a person is charged with a serious crime, the government interest in prosecuting a person may be diminished under "special circumstances." *Id.* at 284. In *Sell* the Supreme Court provided two specific examples of special circumstances that undermine the state's interest in prosecuting a defendant. 539 U.S. at 180. First, where a defendant faces the prospect of a "lengthy commitment in an institution for the mentally ill," the state's interest in prosecuting that individual is diminished because it lessens "the risks that ordinarily attach to freeing without punishment one who has committed a serious crime." *Id.* at 180. Second, the state's interest is diminished where a defendant has already accrued a significant amount of "credit toward any sentence ultimately imposed." *Id.*

In this case, Mr. Awad concedes that many of his charges are serious crimes. However, both special circumstances are applicable to Mr. Awad. First, if Mr. Awad is not restored he will be subject to civil

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probable sentence. *State v. Seekins*, 299 Conn. 141, 157-58, (Conn. 2010). Here Mr. Awad concedes that most of the charges are serious.

commitment proceedings. (Tr. at 95-97.) The trial court even noted that if Mr. Awad was civilly committed to Riverview, "he could be there for years." (Tr. at 179.) In its order the trial court also stated that if Mr. Awad's competency were not restored that "the very real possibility exists that the Defendant will be confined to a mental institution for the foreseeable future." (A. at 46.) Second, as the record demonstrates, Mr. Awad, at the time of the hearing in March, had been incarcerated or held at Riverview since 2013. One witness testified that Mr. Awad had either been in jail or at Riverview for 30 months. (Tr. at 173.) Thus, he has accrued a significant amount of pretrial credit, diminishing the State's interest in prosecuting him. In addition, according to Mr. Awad's counsel, an offer had been extended that "would have secured his release sometime in 2014 or early 2015."[7] (Tr. at 183.)

It is the State's burden to prove that the State has an important interest in prosecuting Mr. Awad, which is not diminished by the existence of special circumstances. Because both special circumstances articulated in *Sell* apply in this case, the trial court erred in finding by

[7] It is not clear if this offer also included the charges in the Kennebec County matter.

clear and convincing evidence that the State has an important interest in prosecuting Mr. Awad.

III. The State failed to meet its burden to prove by clear and convincing evidence that forcibly medicating Mr. Awad will significantly further important state interests under the second *Sell* factor, because it was not proven that such an extreme intervention is substantially likely to render Mr. Awad competent to proceed and is substantially unlikely to produce side effects that will significantly interfere with his ability to assist in his defense.

The evidence presented at the hearing was insufficient to support the conclusion by the trial court that Mr. Awad was likely to be restored to competency if he were involuntarily medicated. The second *Sell* factor requires that the State prove by clear and convincing evidence that the interests of the State will be significantly furthered by involuntarily medicating a person. This means that a court must find that the involuntary administration of said drugs is "*substantially likely* to render the defendant competent to stand trial." *Sell, 539 U.S.* at 181 (emphasis added). The Court must also find that "administration of the drugs is *substantially unlikely* to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense, thereby rendering the trial unfair." *Id. (emphasis added).* Regardless of the standard of review this Court applies to the second *Sell*

factor, the State failed to prove that the forcible administration of psychotropic medication is likely to restore Mr. Awad's competency.

Dr. Peter Donnelly testified that Mr. Awad may have cognitive limitations which impact his neurological functioning, making it very difficult to determine what effect medication would have on his competence. (Tr. at 40-41.) When asked the likelihood of a "medication regime" restoring Mr. Awad's competency, Dr. Donnelly stated that any opinion he offered would simply be a guess. (Tr. at 40-41.)

Dr. Voss, the only *psychiatrist* to testify, stated that he believed medication would improve Mr. Awad's general functioning, but distinguished this from competency. (Tr. at 134.) Dr. Voss concluded that even if he were to be medicated, the prognosis for restoring Mr. Awad's competency was poor due in part to the severity of Mr. Awad's condition and the prior substance abuse and personality problems. (Tr. at 136-37.) Furthermore, the Court's opinion found that Dr. Voss's testimony was "quite thoughtful and objective." (A. at 45.)

Ms. Miriam Davidson, a psychiatric nurse practitioner, and the least experienced of the three witnesses, testified that she had noticed some improvement in daily living when Mr. Awad was taking medication,

albeit sub-therapeutic dosages. (Tr. at 77.) She gave examples including using the toilet appropriate, being safer on the unit and going to the cafeteria. (Tr. at 77-78.) However, as noted by Dr. Voss, none of those observations translate into competency.

Following what the trial court described as "coaxing from the State," Ms. Davidson offered the conclusory opinion that medication was substantially likely to restore Mr. Awad's competency. (Tr. at 102.) However, Mr. Awad objected to that testimony and on cross Ms. Davidson admitted that she is "not qualified to offer a forensic opinion in regard to competency of Mr. Awad or any other patient." (Tr. at 104.) Later in regard to questioning about Mr. Awad's ability to assist counsel, she testified "that's another concept that maybe I'm not as familiar with as I should be in my assessment..." (Tr. at 107.) Ms. Davidson also clarified that when she testified that that medication was substantially likely to render Mr. Awad competent, she meant it was more likely than not that medication would restore his competency. (Tr. at 106.)

Yet, despite her own admission that she was not qualified to offer an opinion as to competency, and admittedly was not even familiar with the concept of a defendant being able to assist counsel, the trial court

specifically credited her coaxed testimony that "involuntary mediation was substantially likely to render the Defendant competent to proceed." (A. at 45.)

The trial court abused its discretion by admitting Ms. Davidson's testimony that forcibly medicating Mr. Awad was substantially likely to restore his competency, because by her own account she was not qualified to offer that opinion. *See State v. Cookson,* 2003 ME 136, ¶ 20, 837 A.2d 101, 108 (qualification of expert reviewed for abuse of discretion). An "expert" cannot testify that a treatment will restore someone's competency when they are not even qualified to determine if someone is competent in the first place, and is not familiar with all the concepts associated with legal competence.

In addition, Ms. Davidson later clarified that when she testified medication was substantially likely to restore Mr. Awad's competency, she meant that it was *more likely than not* his competence would be restored. (Tr. at 106.) The State has the burden to prove, by clear and convincing evidence, that medication is *substantially likely* to restore Mr. Awad's competency. Other courts have held that in the context of restoration of competency, the term "substantially likely," requires the

"that the chance for restoration to be great...it should reflect a probability of more than seventy percent." *State v. Barzee*, 177 P.3d at 60-61; *United States v. Rivera-Morales*, 365 F.Supp.2d 1139, 1141 (S.D. Cal. 2005) ("a chance of success that is simply more than a 50% chance of success does not suffice to meet this standard."). Ms. Davidson's testimony was insufficient, even under a clear error standard, to support the Court's conclusion that the State had met its burden of proof, because she only testified that it was more likely than not he would be restored.

Other portions of her testimony were equally flawed and should not have been credited. Ms. Davidson testified that she had done some research which concluded that "that for Defendants who have a psychotic illness that close to 79 percent can restore their competency with antipsychotic medication treatment." (Tr. at 101.) She did not offer specific information about those studies, such as what "psychotic" illness those persons were diagnosed with, the types of medications that were administered, the dosage of those mediations, the side effects among those groups, or the length of time that it took to restore competency. (Tr. at 102.) Similar testimony has been given little weight by other courts. *See United States v. Watson,* 793 F.3d at 426 (In highlighting the

minimal weight of that portion of the testimony, the court noted that the studies did not identify the specific medications used in the studies and did not focus on a specific diagnosis.) The testimony offered by Ms. Davidson in regard to those studies was even less specific and should be given no weight at all.

In regard to the question as to whether medication is substantially unlikely to produce side effects that would interfere with Mr. Awad's ability to assist in his defense, the testimony was speculative at best. Ms. Davidson testified that "sedation is something that may cause a concern, but ...we would keep looking at dosage adjustments to address the sedation if it seemed to be impacting his ability to communicate and engage in all those things." (Tr. at 85.) Neither she nor any other witness testified that the medications were substantially unlikely to impair his ability to assist in his defense. The witnesses were aware that such side effects could be an issue, but were unable to offer any reliable conclusions as to how these medications might impact his ability to assist with his defense. The State simply did not present clear and convincing evidence on this point.

Even when reviewing for clear error under *Sell,* a court is "charged with ensuring that the [trial court] actually makes the necessary findings, and that it makes them pursuant to the proper legal standard—that it asks and answers the right questions in light of the record as a whole." *United States v. Watson*, 793 F.3d at 423. Under any standard of review, the evidence offered at the hearing was insufficient to meet the State's burden to prove by clear and convincing evidence that involuntarily medicating Mr. Awad is substantially likely to restore his competency.

IV. The trial court failed to make the necessary factual findings to support its conclusion that the State met its burden to prove the *Sell* factors by clear and convincing evidence

The trial court's order does not contain sufficient factual findings to support each of the *Sell* factors by clear and convincing evidence. The *Sell* decision requires the court to make a number of findings as part of its analysis. 539 U.S. at 181-83. Accordingly, appellate courts in other jurisdictions have required the trial court to make detailed findings in their orders. *State v. Lopes*, 355 Or. at 102 ("a trial judge must expressly find necessary facts to support [findings under *Sell*] by clear and convincing evidence." *Warren v. State*. 297 Ga. 810, 831 (Ga. 2015).

("Given the severity of the intrusion and corresponding importance of the constitutional issue, the judicial findings required to authorize such an intrusion by the State must be made with care and thoroughness, and with sufficient detail to allow meaningful review on appeal.") *United States v. Chaves*, 734 F.3d at 1252 ("high level of detail plainly contemplated by the comprehensive findings *Sell* requires.")

a. The trial court failed to make factual findings sufficient to withstand appellate review where it did not explain why it credited Ms. Davidson's testimony over that of Dr. Voss and Dr. Donnelly.

As argued in section III, the record evidence is insufficient under any standard of review to uphold the trial court's decision that the State met its burden to prove the second *Sell* factor by clear and convincing evidence, because the testimony from Ms. Davidson was insufficient to support those findings. A closely related, but separate issue, is that the trial court did not adequately explain why, given the "conflict" in the evidence (A. at 46.) it adopted the opinion of Ms. Davidson, a less experienced professional. This is especially puzzling because the trial court credited Dr. Voss's testimony as being "thorough and objective" but yet rejected his conclusion. (A. at 45.)

Dr. Voss and Dr. Donnelly both individually have decades of experience in the area of forensics. According to her *curriculum vitae*, Ms. Davidson has been working as a psychiatric nurse practitioner for seven years. In addition, Dr. Voss is a psychiatrist. Dr. Donnelly is a psychologist. As indicated *supra*, the trial court is required to make detailed factual findings as part of its order. *Warren v. State*, 297 Ga. at 828. The factual findings of the trial court fail to adequately explain its reasoning for finding that the State met its burden of clear and convincing evidence based on the conflicting testimony of the witnesses.

b. <u>The trial court's factual findings are insufficient where the order fails to identify the specific medications and maximum dosages that can be administered to Mr. Awad and still comport with the second and forth Sell factors.</u>

One of the critical factual finding that must be made to uphold an order forcibly medicating a defendant under the second and forth *Sell* factors are findings "assessing the likely success of the government's proposed treatment plan in relation to [the defendant's] particular condition and particular circumstances." *United States v. Watson*, 793 F.3d at 424. "The question is not whether a proposed treatment plan is likely to work in general, but whether it is likely to work as applied to a particular defendant." *Id.* at 425.

In *Unites States v. Chavez,* the 10th circuit court held that the second and fourth *Sell* requirements were not met by the trial court's order where the court failed to specify all the drugs that might be administered and their respective dosages. 734 F.3d at 1254. In *United States v. Hernandez-Vasquez*, the court set forth specific factors that must be addressed in the district court's order, stating:

> [a]t a minimum, to pass muster under Sell, the district court's order must identify: (1) the specific medication or range of medications that the treating physicians are permitted to use in their treatment of the defendant, (2) the maximum dosages that may be administered, and (3) the duration of time that involuntary treatment of the defendant may continue before the treating physicians are required to report back to the court....

513 F.3d at 916-17. Other courts have similarly held that the trial court's order must set forth a treatment plan that sets forth the "specific medications, alternative means of injecting it, the specific dosage, and the potential side effects..." *United States v. Green*, 532 F.3d 538, 557 (6th Cir. 2008); *See also United States v. Evans*, 404 F.3d 227, 241 (4th Cir. 2005) (analysis insufficient to satisfy *Sell* second and forth factors); *United States v. Chavez*, 734 F.3d at 1252 ("without knowing what drugs the government might administer and at what range of doses, a court cannot properly conclude that such a vague treatment plan is 'medically

appropriate, i.e. in the patient's best interest' as the fourth part of *Sell* demands.")

Here the trial court authorized the involuntary administration of any "[a]ntipsychotic medication as deemed appropriate by the Defendant's treating medical team..." (A. at 47.) Maximum dosages were not set by the trial court. This is problematic because, as indicated through testimony, different medications may produce different side effects at different dosages. (Tr. at 122.) In turn, those side effects may impact whether a medication will interfere significantly with the defendant's ability to assist counsel in his or her defense, or whether administration of that medication is in the defendant's best interest, which are the second and forth *Sell* factors. (Tr. at 123). In addition, certain medications at certain dosages may not be substantially likely to restore a person's competency.

The State will likely argue that the treatment providers at Riverview are in the best position to make those clinical decisions, and should not be hampered by limitations. The proper response to this argument was articulated by the Supreme Court of Georgia in *Warren v. State*:

> And Sell does not condone---nor will this Court allow—trial courts to cede oversight of such a significant constitutional matter to the State, allowing its doctors to force a mentally ill criminal defendant to take whatever medication in whatever dosages and for whatever period of time they consider appropriate. We would hope that the State's physicians, as healthcare professionals, would not misuse such unfettered authority, but history teaches that involuntary medical treatment, especially of the poor, the outcast, and the incarcerated, is worthy of close and independent oversight.

297 Ga. at 831. The trial court erred by not specifically identifying medications to be administered to Mr. Awad, or by setting maximum dosages.[8] Accordingly, the case should be remanded for the trial court to specify which medications may be administered and the maximum dosage allowable in a form of a judicially approved treatment plan.

c. <u>The trial court's order is inadequate because it failed to consider whether alternate grounds exist to medicate Mr. Awad, which is a prerequisite for determining whether involuntarily medicating a defendant under *Sell* is necessary to further important state interests</u>

The trial court should have considered alternative grounds upon which to medicate Mr. Awad, before concluding that forcibly administering medication pursuant to *Sell* is necessary to further important state interest. The third *Sell* factor and 15 M.R.S. § 106

[8] The trial court did require that weekly progress notes be provided to the Court and counsel, and well as "forensic monitoring" by the State Forensic Service. This level of motoring should be required in all cases where a defendant is ordered to be involuntarily medicated pursuant to *Sell* and 15 M.R.S. § 106.

(3)(B)(3) require the State to prove that forcibly medicating the defendant for the purpose of restoring competency is necessary to further an important state interest. However, this factor cannot be met if there are other alternative grounds to medicate a defendant, such as those articulated in *Washington v. Harper*, 494 U.S. 210 (1990) (allowing inmate to be involuntarily medicated if they are dangerous). In fact, *Sell* specifically directs that, if the State seeks to involuntarily medicate a defendant to restore their competency, the trial court should "determine whether the Government seeks, or has first sought, permission for forced administration of drugs on these other *Harper*-type grounds, and if not, why not." 539 U.S. at 188. *See Warren v. State*, 297 Ga. at 837; *United States v. Chavez*, 734 F.3d 1247, n1 (10th Cir. 2013); *United States v. Hernandez-Vasquez*, 513 F.3d at 914 (9th Cir. 2007) (Court should make *Harper* inquiry before *Sell* hearing. If a dangerousness hearing is not conducted, record should reflect why not.)

The trial court did not make a specific *Harper* analysis. However, several witnesses made references to Mr. Awad's dangerousness being reduced while on trials of medications, which in turn suggests that alternate grounds may have existed. (Tr. at 27, 68, 70, 118.) In addition,

there was no evidence presented as to why the State had not sought a medical guardianship over Mr. Awad before asking the trial court for authority to involuntarily medicate Mr. Awad under 15 M.R.S. § 106 and *Sell*. *See In re Anthony R.*, 2010 ME 4, 987 A.2d 532. All of these are alternatives available to the State that should have been explored. Accordingly, the trial court erred by not conducting an inquiry pursuant to *Harper*, and instead relying on 15 M.R.S. § 106 and *Sell* as a basis to involuntarily medicate Mr. Awad.

Conclusion

The State failed to prove each of the *Sell* factors by clear and convincing evidence. As such, this Court should vacate the trial court's order.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on May 31, 2016, I caused to be served upon all parties, two conformed copies of the Brief of the Appellant by delivering said copies to:

Kate Marshall, Esq.
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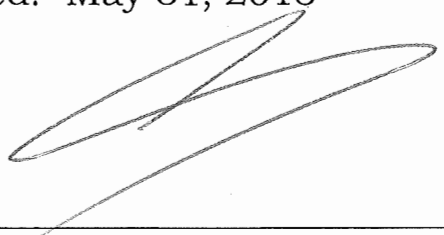
Dated: May 31, 2016



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